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No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

TERRY B. ALLEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The
Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are disclosures made to psychiatrists in a civil involuntary commitment proceeding protected by the fifth amendment privilege against compulsory self-incrimination.

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OPINION BELOW

A copy of the decision of the Illinois Supreme Court in People v. Allen, No. 60184 (Ill. Sup. Ct. July 17, 1985) is appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the Illinois Supreme Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Amplification and clarification of petitioner's factual statement have been incorporated within argument.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS AN UNSUITABLE OPPORTUNITY TO RE-EXAMINE WELL-ESTABLISHED DECISIONAL LAW.

Respondent believes that petitioner essentially seeks to challenge settled constitutional law. (See Argument II infra). In this connection, however, respondent also contends that this case is particularly ill-suited for a re-evaluation of the self-incrimination issue.

The Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat. (1979) ch. 38 ¶ 105-1.01 et. seq., basically provides an involuntary mental health commitment procedure for recidivist sexual offenders. Allen's statements to psychiatrists were used to establish his status under that act. Allen freely waived any constitutional protection he may have had, however, to provide wholly voluntary disclosures.[1] In a related manner, because Allen chose to answer questions, there is no "compulsory" speech involved for a fifth amendment violation.

Before this decision, Illinois courts recognized a limited privilege against self-incrimination for sexually dangerous persons proceedings. People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964). Moreover, only petitioner knew which solicited disclosures would be incriminating. Because the fifth amendment privilege is not self-executing, petitioner, represented by counsel, could be expected to refuse answers during the court-ordered interviews. Minnesota v. Murphy, _ U.S.__, 104 S.Ct. 1136, 1142-43 (1984)(disclosures of probationer were required but not compelled); Roberts v. United

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[1] Before the interview, one of the psychiatrists told Allen that any disclosures could be included in the report submitted to the court and counsel. The examiner then received petitioner's complete understanding of the non-privileged nature of the examination. (R. 126-27). Petitioner, represented by counsel, cooperated fully with the psychiatrists to answer all questions. Indeed, one of the psychiatrists concluded that Allen wanted to be declared a sexually dangerous person to avoid criminal prosecution.

The Illinois Supreme Court also found petitioner's statements to be voluntary in the traditional sense. People v. Allen, slip op. at 6.

States, 445 U.S. 552, 560 (1980)(defendant was expected to assert the privilege during questioning conducted by the United States Attorney); Garner v. United States, 424 U.S. 648, 654-55 (1976)(taxpayer disclosures are required but not compelled absent privilege assertion); United States v. Mandujano, 425 U.S. 564, 574-75 (1976)(without claim of privilege, grand jury witness must answer questions); and United States v. Kordel, 397 U.S. 1, 9-10 (1970)(answers of counseled deponent who did not claim privilege were not compelled). Because there is no indication that Allen was "compelled" to speak to examining psychiatrists, this case is unsuitable for certiorari review of a fifth amendment compulsory self-incrimination claim.

II.

THE DECISION OF THE ILLINOIS COURT IS CONSISTENT WITH PUBLIC POLICY AND WELL-ESTABLISHED LAW.

Respondent is not aware of any decision of this Court which considers the applicability of the fifth amendment privilege against compulsory self-incrimination to a civil involuntary commitment proceeding. This does not mean that certiorari should be granted as a matter of course, however. Measured against the background of lower court case precedent, the Illinois Supreme Court decision was neither aberrational nor noteworthy. The decision challenged by petitioner represents merely the Illinois court's recognition of the well-established fifth amendment jurisprudence announced by other state and federal courts.

Indeed, the very issue sub judice may well have been resolved in dicta in this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981). Although the prosecutor could not use unwarned statements to psychiatrists to enhance sentence in a criminal prosecution, this Court cautioned that "no fifth amendment issue would have arisen" if defendant's statements had been used for the "limited, neutral purpose of determining competency to stand trial". 451 U.S. at 465. As a result, respondent submits that the privilege is not implicated when

statements are used to establish mental illness, rather than criminal responsibility, in a civil proceeding.

The Illinois Supreme Court concluded that the privilege against self-incrimination is not available to shield disclosures in a SDP proceeding. People v. Allen, slip op. at 7. In his attempt to challenge the lower court's decision, petitioner misconstrues settled constitutional law in two ways. Petitioner first argues that the privilege is required to assure reliability of the SDP finding. (Pet. 9). Concern for false confessions may be somewhat unwarranted in a mental health context, because examining psychiatrists are wholly unconcerned with truthfulness of statement content. Allen's lies or distortions would have been equally helpful in these mental status evaluations designed to probe his thought processes. (R. 116). Equally important, reliability of the hearing mechanism is assured by procedural safeguards conferred by statute.[2] People v. Allen, slip op. at 6-7. The real concern of the fifth amendment, in contrast, is the source of the government's proof and the proper relationship between the individual and the state. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). The Illinois court was required to decide whether the government would be deprived of the "best evidence" of petitioner's mental state, for "it is only from the mouths of those having knowledge [of the pertinent subject matter] that the facts can be ascertained". Brown v. Walker, 161 U.S. 591, 610 (1896). See also Estelle v. Smith, 451 U.S. at 465 (State should not be deprived of the only effective means of contraverting defendant's proof).

Petitioner next argues that the liberty deprivation involved mandates recognition of the fifth amendment privilege. (Pet. 6). This is demonstrably incorrect. Despite the existence

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[2] These include the right to trial by jury, the right to counsel, and the reasonable doubt standard of proof. Ill. Rev. Stat. (1979) ch. 38, pars. 105-5 and 105-3.01. The right to confront witnesses was recognized in People v. Nastasio, 19 Ill.2d 524 (1960).

of a significant liberty interest, safeguards associated with a criminal trial have been withheld by this Court in a variety of contexts. For example, the privilege against self-incrimination does not extend to probation revocation hearings. Minnesota v. Murphy, __U.S.__, 104 S.Ct. 1136 (1984). Concerning mental health proceedings specifically, the reasonable doubt standard of proof is not constitutionally required in involuntary commitment hearings. Addington v. Texas, 441 U.S. 418 (1979). Pre-commitment judicial hearings are not required for mentally ill children under Parham v. J.R., 442 U.S. 584 (1979). Finally, there is no constitutional right to trial by jury in juvenile delinquency hearings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). A less simplistic approach to the problem is clearly necessary.

In the past, this Court has examined both the nature of the proceeding and the content of the disclosures to determine the appropriate scope of the fifth amendment privilege. The fifth amendment provides that "[n]o person...shall be compelled in any criminal case to be a witness against himself" (emphasis supplied). The privilege has accordingly been withheld in civil proceedings generally. See, e.g., United States ex rel. Vajtauer v. Comm'r of Immigration at Port of New York, 273 U.S. 103 (1927). The Illinois Supreme Court denied the privilege upon the basis that Illinois Sexually Dangerous Persons proceedings are civil in name and fact, slip op. at 4, and that decision is well supported by state law. Ill. Rev. Stat. (1979) ch. 38 ¶ 105-3.01 (civil by definition); People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949)(civil proceedings which ascertain mental state rather than criminal culpability); and People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678 (1972)(recognizing legislative purpose to prevent criminal punishment of persons suffering from mental disorders). In sum, respondent endorses this Court's observation that

> unlike the delinquency proceedings in [In Re] Winship, [397 U.S. 358 (1970)], a civil commitment proceeding can in no sense be equated to a criminal prosecution.

Addington v. Texas, 441 U.S. at 428. The SDP proceeding is a medical inquiry, in which psychiatric testimony is received to formulate a treatment decision, for which the full panoply of criminal trial safeguards is inappropriate.[3] Parham v. J.R., 442 U.S. at 586. See also Estelle v. Smith, 451 U.S. at 475-76 (Rehnquist, J., dissenting)(Miranda warnings are inappropriate for forensic evaluations).

Respondent recognizes that availability of the privilege also turns on "the nature of the statement and the exposure which it invites". In Re Gault, 387 U.S. 1, 49 (1967), as cited in the petition at 6. Statement content is also considered in the fifth amendment calculus. Allen's statements were received as descriptions of his need for mental health commitment, however; they were not regarded as confessions of criminal liability. The fifth amendment is implicated only if there is a real exposure to criminal prosecution. 8 Wigmore, Evidence § 2257 (McNaughton ed. 1961). Well-established decisional law again affirms this point. The privilege protects only

> disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might so be used.

Murphy v. Waterfront Comm'n, 378 U.S. at 94. In the words of Mr. Justice Rehnquist describing forensic evaluations,

> the psychiatrist's interrogation...in the belief that the substance of [petitioner's] responses or the way in which he gave them might cast light on what manner of man he was[,] involved no 'compelled testimonial self-incrimination'.

Estelle v. Smith, 451 U.S. at 475 (citation deleted). See also the remarks of Mr. Justice Brennan concurring in Roberts v. United States, 445 U.S. at 562 (Miranda warnings are not

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[3] Petitioner below also argued that Miranda v. Arizona, 384 U.S. 436 (1966) warnings are required to render statements admissible in an SDP proceeding. Because it held the fifth amendment privilege inapplicable, the Illinois Supreme Court did not reach this issue. (slip op. at 7). Respondent notes that petitioner was represented by counsel and respectfully refers this Court to the decisions in In Re Winstead, 67 Oh.App.2d 111, 425 N.E. 2d 943 (1980) and French v. Blackburn, 428 F. Supp. 1351 (D. N.C.), aff'd without op. 443 U.S. 901 (1977). See also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (Miranda admonishments are not required in civil cases). This argument has not won acceptance in the lower courts.

required when the examiner does not seek to incriminate on the issue of criminal culpability) and California v. Byers, 402 U.S. 424, 429 (1971)(the fifth amendment is not applicable to compulsory disclosures that do not create "substantial hazards of incrimination"). The Illinois Supreme Court adequately recognized and protected petitioner's fifth amendment privilege by ruling that Allen's disclosures could not be used in any criminal prosecution. People v. Allen, slip op. at 8. Accord, Estelle v. Smith, 451 U.S. at 468-69. Because Allen's statements did not "incriminate" him, no privilege was available.

Respondent finally submits that the state maintains a legitimate, significant interest in retaining a civil treatment alternative for the mentally ill offender. Compare Pet. 10. The sovereign states unquestionably hold a parens patriae authority to provide treatment and rehabilitation to those involuntarily committed in their courts. Addington v. Texas, 441 U.S. at 426. Within constitutional limits, the state legislatures are free to devise means by which to combat the grave problem of the mentally ill, recidivist sexual offender. Restrictions without constitutional foundation will only serve to thwart legitimate state goals. United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984).

This Court has already declined to review a remarkably similar state court decision. Commonwealth v. Barboza, 387 Mass. 105, 438 N.E.2d 1064, cert. denied __U.S.__, 103 S.Ct. 385 (1982). A growing number of states have denied the fifth amendment privilege for involuntary commitment proceedings to provide the lead now followed by Illinois. Moss v. State, 539 S.W.2d 936 (Tex. Civ. App. 1976); State v. Matthews, 46 Or. App. 757, 613 P.2d 88, cert. denied 450 U.S. 1040 (1980); Cramer v. Tyars, 151 Cal. Rptr. 653, 23 Cal.3d 131, 588 P.2d 793 (1979)(en banc); In Re Beverly, 342 So.2d 481 (Fla. Sup. Ct. 1977); Sas v. Maryland, 295 F.Supp. 389 (D. Md. 1969), aff'd sub nom. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City

Criminal Court, 407 U.S. 355 (1972); and State ex rel. Kiritsis v. Marion Probate Court, 269 Ind. 550, 381 N.E.2d 1245 (1978).

Because the several states have reached the same conclusion, a conclusion which respects established decisional law and sound public policy, there is no need for this Court to provide authoritative guidance at this time. Indeed, petitioner's argument essentially rejects the prior pronouncements of this Court. There is no need for certiorari review as a result.

CONCLUSION

For these reasons, respondent State of Illinois respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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